



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** C.W. Construction, Inc.

**File:** B-233086; B-233087

**Date:** February 14, 1989

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### **DIGEST**

1. Where the issuer of a letter of credit submitted as a bid guarantee is neither a bank nor an otherwise regulated financial institution it is appropriate for a contracting agency to examine not only the form and content of the letter of credit, but also to ascertain the financial status of the issuer.
2. Protester was properly found nonresponsible where it failed to provide adequate evidence to permit a finding that the issuer of its letter of credit was financially sound and the record shows that the contracting officer's nonresponsibility determination was reasonably based.
3. An agency is not required to delay award indefinitely until a bidder cures the causes of its nonresponsibility. Rejection of protester's bid is proper where the agency set a reasonable deadline for receipt of additional information concerning the bidder's responsibility, by which time none had been submitted, and where protester's "additional information" was not submitted until the day the agency's bid protest report was transmitted to the General Accounting Office, and was the same as data already considered and found insufficient by the contracting officer.
4. Fact that one contracting agency may have accepted a letter of credit from the protester's surety in an earlier procurement does not compel another agency to accept a letter of credit from the same surety where based on the information presented to it the second agency reasonably determined the surety to be unacceptable.

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### **DECISION**

C.W. Construction, Inc., protests the rejection of its bids under invitation for bids (IFB) Nos. N62477-86-B-1010 (B-233086) and N62477-87-B-1224 (B-233087), both issued by the Department of the Navy for construction work on Marine

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Corps facilities at Quantico, Virginia. C.W. contends that its bids were improperly rejected based on the contracting officer's unwarranted finding that its surety was nonresponsible.

We deny the protests.

The solicitations contained the standard bid guarantee clause, Federal Acquisition Regulation (FAR) § 52.228-1, which required bidders to furnish a bid guarantee in the form of a firm commitment, such as an irrevocable letter of credit. In each procurement, C.W. submitted as its bid guarantee an irrevocable letter of credit issued by FinanCorp, Inc., which, according to the company's financial statement, was "organized to provide financial and consulting services to small businesses." Since FinanCorp had been incorporated in March 1988, had been qualified to do business in Maryland for only a very brief time, and was neither a bank nor a regulated financial institution, the contracting officer sought additional information from C.W. concerning the financial status of FinanCorp.

In response, C.W. submitted a report from a certified public accountant (CPA). The CPA's cover letter stated that the report only contained information that was supplied by FinanCorp itself, and that since the information was not the result of an audit or financial statement review, the CPA did not express an opinion or any other form of assurance on the accuracy of the supplied financial data. The contracting officer determined that the report submitted by C.W. was inadequate to establish FinanCorp's financial status and by a letter of October 12, 1988, requested C.W. to furnish within 10 days of receipt thereof either a CPA-certified balance sheet and an income statement with a signed opinion, or a CPA certification of liens or other encumbrances which exist. Since the agency did not receive a response from C.W. within that time period the contracting officer found FinanCorp to be nonresponsible and rejected C.W.'s bids.

C.W. challenges the Navy's rejections of its letters of credit as unacceptable, contending that the question of whether or not an offered letter of credit will suffice as a bid guarantee depends on whether the letter could be enforced against the issuer if the bidder fails to execute the required contract documents. In support of its contention C.W. cites Bailey Enterprises, 66 Comp. Gen. 323 (1987), 87-1 CPD ¶ 265, wherein we sustained a protest based upon an agency's improper rejection of an acceptable letter of credit.

In Bailey, we enunciated the standard by which to judge the acceptability of a letter of credit. We stated that "a letter of credit is essentially a third-party beneficiary contract whereby a party desiring to transact business induces another, usually a bank" (emphasis added), to issue a letter to a third party promising to honor that party's drafts or other demands for payment. Whether an offered letter of credit will suffice as a bid guarantee depends on whether the credit could be enforced against the issuer if the bidder fails to execute the required contract documents. Bailey Enterprises, 66 Comp. Gen. supra. In Bailey, however, the issuer of the letter of credit was a bank, unlike in the instant case where the issuer is a newly formed corporation. While the protester correctly cites our standard, it wrongly relies upon a line of cases whose facts materially differ from its own.

Although in our experience with letters of credit the issuer has normally been either a bank or a regulated financial institution, we recognize that other entities could serve as issuers if otherwise acceptable to the government. See Uniform Commercial Code (UCC) section 5-102.1/ When the issuer is a bank or a regulated financial institution it is ordinarily unnecessary to establish the financial status of the issuer. In this case, however, since the issuer is neither a bank nor a regulated financial institution but rather is a newly incorporated business, it is reasonable for the agency to conduct an inquiry into the financial status of the issuer. It is important for the agency to be assured of FinanCorp's financial status because if it lacks the resources to honor its letter of credit then the agency would be unable to enforce the credit against FinanCorp, defeating the purpose of the bid guarantee. Here, as with an individual surety, it is appropriate for the contracting agency to ascertain the financial status of the issuer in case it is called upon to honor the letter of credit.

The determination of the acceptability of an corporate issuer of a letter of credit is an issue of responsibility and in making this determination therefore, the agency is vested with a wide degree of discretion and business judgment. (Cf., Aceves Construction and Maintenance, Inc., B-233027, Jan. 14, 1988, 88-2 CPD ¶ \_\_\_, wherein we enunciated this same standard for the determination of the acceptability of an individual surety). An agency's finding

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1/ We have specifically recognized that our Office will look to UCC principles as a source of federal common law. R.H. Pines Corp., 54 Comp. Gen. 527 (1974), 74-2 CPD ¶ 385.

of nonresponsibility will not be questioned unless the protester demonstrates bad faith by the agency or a lack of any reasonable basis for the contracting officer's negative responsibility determination. National Health Laboratories, Inc., B-228402, Dec. 10, 1987, 87-2 CPD ¶ 576.

The financial statement submitted by C.W. reflected assets of \$397,499 and current liabilities of \$93,855, indicating a net worth greater than the total value of outstanding letters of credit issued by FinanCorp. As we noted above, however, the documents purporting to establish this net worth were prefaced with a statement by the CPA that the information contained therein had been given to it by FinanCorp and had not been the result of a CPA audit or financial statement review. The contracting officer, therefore, had no way of knowing from this report whether or not it was an accurate reflection of the true net worth of FinanCorp.

The agency noted, for instance, that although the balance sheet reflected total assets of \$397,499, note five to the financial statement indicated that a bank loan to FinanCorp had been previously secured by many, if not all, of these very assets, including accounts and notes receivable, furniture, fixtures, and leasehold improvements. FinanCorp's stated assets, therefore, were encumbered with a bank's security interest and could not be reached by subsequent creditors until the bank's debt had been extinguished.

The agency also asserts that the documentation submitted did not support the convertibility of the accounts receivable since it was questionable whether the \$24,389 in employee advances and the \$35,000 in unpaid stock subscriptions could be readily collected. The convertibility of accounts receivable is important because if FinanCorp is called upon to honor its letter of credit it currently may lack the liquid assets to pay the government.

In addition, the Navy points out that \$252,066 of the current assets reflected were accounts receivable from a "GARP Program," which, according to the financial statements, are accounts receivable to small government contractors, secured by an assignment of the proceeds from the contracts. Under these circumstances, the agency concludes the federal government could be the obligor on these assignments, and as obligor the government may have to assert any defenses it may have against the contractor arising from the assigned contract, thus finding itself in a conflict of interest situation.

The Navy also stresses the fact that FinanCorp had only been in operation for approximately 4 months, and only had a monthly average net income of \$911 with outstanding bid guarantees in the amount \$170,248, and thus if called upon to honor these guarantees may currently lack the funds. Based on this assessment of the submitted financial data and the failure of C.W. to submit additional information within the requested 10-day period, the Navy contends that contracting officer reasonably found FinanCorp to be nonresponsible.

In response to the agency report, C.W. maintained that it had submitted additional financial information in response to the contracting officer's request, contrary to the Navy's statement that it had not. Further, the protester argued in general terms that the financial data submitted was more than adequate to establish the financial responsibility of FinanCorp. We asked the Navy to respond to the protester's comments because it appeared that the protester may have submitted in a reasonably timely fashion additional financial information which the contracting officer had an opportunity to consider, but did not, prior to determining that C.W.'s surety was unacceptable.

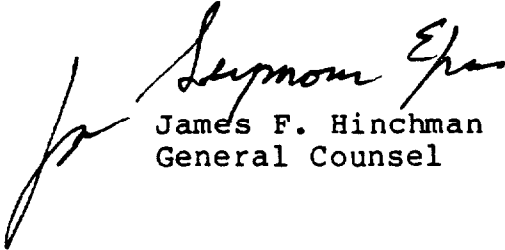
The Navy replies that the "additional information" was not received by the field activity until November 15, 1988, the same day that the command headquarters had forwarded to our Office its reports in response to C.W.'s protests. The agency points out that not only was the requested information submitted over 2 weeks late, but also that it consisted of the same financial statement that after the earlier review by the contracting officer had prompted the October 12 letter requesting additional information. The agency contends, therefore, that not only did it provide C.W. with ample opportunity to produce adequate evidence concerning the financial status of FinanCorp, but it was also justified in determining FinanCorp to be nonresponsible given C.W.'s continued failure to prove it otherwise.

We agree with the agency. First, an agency is not required to delay award indefinitely while a bidder attempts to cure a problem of responsibility and it may set a reasonable deadline for receipt of information concerning the bidder's responsibility. Aceves Construction and Maintenance, Inc., B-233027, supra. We believe that the 10-day period that the agency set was a reasonable deadline for the receipt of information, and we note further, that C.W. has not contended otherwise.

Secondly, it was appropriate for the contracting officer to attempt to ascertain, with some degree of certainty, the financial strength of the issuer of C.W.'s letter of credit. The agency was not unreasonable in its determination of nonresponsibility of FinanCorp based on the concerns raised by the provided information and the lack of evidence to suggest those concerns were unfounded.

Finally, C.W. alleges that the Army Corps of Engineers had accepted from FinanCorp a letter of credit similar to the one provided in the instant case. The fact that one contracting agency may have accepted a letter of credit from the protester's surety in an earlier procurement, does not compel the contracting officer here to do so where based on the information presented to him he reasonably determines the surety is unacceptable.

The protests are denied.



James F. Hinchman  
General Counsel